

Commentary: Point & counterpoint | Supreme Court - Stop caring when justices retire

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April 8, 2021

Even before our oldest serving president was inaugurated, a progressive chorus began calling for our oldest sitting justice to retire. Pundits and professors argue that 82-year-old Justice Stephen Breyer should step down to guarantee that President Joe Biden names his successor. They raise the object lesson of Justice Ruth Bader Ginsburg, who had declined such entreaties — thinking it more likely that the Democrats would keep the White House than that President Barack Obama could get anyone worthwhile confirmed — and lost her political bet with the actuarial tables.

There's something unseemly here. Why should so much turn on the health or retirement of senescent public officials? Well, what the Supreme Court does matters — and those decisions increasingly turn on the party of the president who nominated justice.

At a time when the parties are more ideologically sorted and polarized than at least the Civil War, different approaches to legal interpretation line up with partisan preferences. It's a relatively new phenomenon, but for the foreseeable future, every Supreme Court vacancy is an opportunity to either prolong one party's control of a particular seat or "flip" it.

That political dynamic is all the more important because it comes at the culmination of decades of the court's self-corruption, aiding and abetting the expansion of federal power, and then the shifting of that power away from the people's representatives and toward executive agencies. As the courts play more of a role in the political process, of course the judicial nomination process is going to be more fraught with partisan considerations.

Moreover, filling each vacancy is a bigger deal because justices now serve longer. In the late 1700s, when life expectancy was under 40, the average age of a Supreme Court nominee was about 50. Now, with life expectancy just under 80 — more than that for those who are already in late middle age — nominees' average age is still not much above 50. Since 1972, only one of 17 justices was over 55 at confirmation, Ginsburg.

To put it another way, before 1970, the average tenure of a Supreme Court justice was less than 15 years. Since then, it's been more than 25. The life expectancy of confirmed justices has grown from about eight years at the beginning of the republic to 25-30 today. Justices appointed at or before age 50, like John Roberts, Elena Kagan, Neil Gorsuch and Amy Coney Barrett, are likely to serve 35 years, projecting the legal-policy effect of presidents George W. Bush, Barack

Obama and Donald Trump, respectively, as far into the future as Antonin Scalia and Anthony Kennedy did for President Ronald Reagan. Clarence Thomas, who was 43 when he joined the court and this fall will mark 30 years, could serve another decade!

In that light, modern confirmation battles are all a logical response to political incentives given judges' novel expansive role. Term limits might forestall morbid health watches over octogenarian justices, but they won't fix the underlying problem. When judges act as super-legislators, the media and the public want to scrutinize their ideology.

As Sen. Ben Sasse, R-Neb., described the dynamic in his opening remarks at Brett Kavanaugh's hearings, Congress doesn't complete its work so it can pass the political buck to a faceless bureaucracy, and to a judiciary that ultimately has to evaluate if what these alphabet agencies come up with is within spitting distance of what the Constitution allows. What's supposed to be the most democratically accountable branch has been punting its duties and avoiding hard choices since long before the current polarization.

Gridlock is a feature of a legislative process that's meant to be hard by design, but compounded of late by citizens of all political views being fed up with a situation where nothing changes regardless of which party is elected. Washington has become a perpetual-motion machine — and the courts are the only actors able to throw in an occasional monkey wrench.

That's why people are concerned about the views of judicial nominees, and why there are more protests outside the Supreme Court than Congress. Only when we fix that dynamic, when the court returns power back to the states and the people, and forces Congress to legislate on the remaining truly national issues, will we stop debating whether and when justices should retire.

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